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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 114

THE J. L. HUDSON COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To The Honorable Supreme Court of The United States:

The J. L. Hudson Company, petitioner herein, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review the decree of that Court entered in this case on April 15, 1943, and shows as follows:

I. Summary Statement of Matter Involved

The proceeding in the Circuit Court of Appeals was a petition filed in that Court by the National Labor Relations Board for enforcement of its order directed to The J. L. Hudson Company, Petitioner herein (R. 1). The order of the National Labor Relations Board was made upon an amended complaint filed by it (R. 33) alleging that The J. L. Hudson Company had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. A. 151).

The answer of the Petitioner, the respondent below, to this complaint denied the jurisdiction of the Board; denied that the Petitioner was engaged in interstate commerce; denied that any of the matters alleged in the complaint affected commerce; and denied that they burdened or obstructed commerce or have caused, will cause or tend to cause any labor dispute burdening or obstructing or affecting commerce or the free flow thereof (R. 43). As to the specific allegations of the complaint as to alleged unfair labor practices, the Petitioner adopted the related facts set forth in the stipulation between the parties.

No evidence was taken before the National Labor Relations Board, but a stipulation as to the facts was entered into by the parties (R. 45). This stipulation may be briefly summarize as follows:

The Petitioner, The J. L. Hudson Company, is engaged at Detroit, Michigan, in the business of conducting a retail department store, buying and selling a large variety of

goods and merchandise. It employs approximately 8,562 employees and operates upwards of 240 separate merchandise departments. In its fiscal year ending January 31, 1942, a typical year, the total cost of goods purchased by it approximated $44,000,000.00, more than 80% of which goods was shipped to it from points outside of Michigan. Its sales for the same year approximated $71,000,000.00 and of these sales approximately $1,250,000.00 were made to customers and users outside of Michigan. It operates a truck delivery system but makes no deliveries with it outside of Michigan. It uses the usual vehicles of commerce such as the railroads, truck lines, etc., to import and export goods which move to it from points outside of Michigan and from it to such customers as are outside of Michigan. It does not own or control any "source of supply," nor does it take the whole output of any "source of supply." It expended in the above year approximately $1,500,000.00 for advertising, a minor portion of which was spent in newspapers and paid to radio stations which carried advertising to points outside of Michigan.

The Union and a group of the Company's employees bargaining through Fred L. Young and Don Calvin are labor organizations within the National Labor Relations Act. John Redmond and Vincent Milioto were employed by Petitioner as "furniture finishers" and Fred L. Young was employed as a "checking clerk, unpacking and checking merchandise against the invoices in the third basement in the Respondent's store." (Paragraphs 24 to 27, R. 58, 59.)

The stipulation also provides as follows:

> "28. The Respondent, the Union and Fred L. Young waive their respective rights to a hearing, as

> provided in Sections 10 (b) and 10 (c) of the Act and waive their respective rights to the makings of findings of fact and conclusions of law by the Board other than as to the question of whether the Act is applicable to the Respondent and to the employees of the Respondent under the facts herein set forth."

There is in the stipulation no recital whatever as to the existence of any unfair labor practices by Petitioner, The J. L. Hudson Company, and therefore, no recital that the asserted acts and practices of the Company affected commerce, or burdened or obstructed it, or led or tended to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

The stipulation does recite as follows (R. 59):

> "29. It is further stipulated and agreed, *subject to the provisions of Paragraph* 31 *below,* that upon the pleadings in the above entitled matters and upon this stipulation the Board may make and issue its order in the following terms:
>
> "The Respondent, The J. L. Hudson Company, its officers, agents, successors, and assigns, shall:" (The following as a summary of the further provisions of the order:)
>
> 1. Cease and desist from discouraging membership in the named union or any other labor organization; in any manner interfering with, restraining or coercing its employees in the exercise of their right to self-organization, to bargain collectively, etc.
>
> 2. Offer reinstatement to the three named discharged employees and make them whole from any loss of pay suffered.

3. Post notices that the Board has issued the order and the Petitioner-Respondent will comply therewith.

Paragraph 31 of the stipulation reads as follows (R. 60):

"31. The Respondent, the Union, and Fred L. Young waive all rights to contest the validity and propriety of entry of the above order by the Board and the entry of any enforcement order and decree by any appropriate court, except that the Respondent reserves to itself the right to be heard in argument orally and by brief upon the facts herein stipulated before the Board and in any appropriate court on the sole issue of the applicability of the Act to the Respondent and to the employees of the Respondent, and the jurisdiction of the Board and such appropriate court to enter against the Respondent the order provided for in Paragraph 29 of this stipulation."

On this record the Board made its order (R. 69, 85), directing the Petitioner to cease and desist from discouraging membership of its employees in United Retail, Wholesale and Department Store Employees of America, C. I. O., or any other labor organization of its employees and from interfering with, restraining or coercing its employees in the exercise of their right to self-organization and to bargain collectively through representatives of their own choosing. It required the Petitioner to offer reinstatement to three employees, John Redmond (formerly John Piskorowski), Vincent Milioto and Fred L. Young, whom the petitioner alleged to have been theretofore discharged and to make such employees whole for any loss of pay suffered by reason of discrimination against them by said Petitioner.

The petition of the National Labor Relations Board to the Circuit Court of Appeals (R. 1) recited the proceedings before it, set forth the order, asserted that it had been duly served, and prayed for its enforcement.

The answer of the Petitioner here, The J. L. Hudson Company (R. 5), to the petition for enforcement denied that the Board had jurisdiction of the Petitioner, it being a retailer; asserted that it was not "in commerce" nor organized "on a national scale," nor in the "stream of commerce;" and that there was no proof or finding to that effect; that there was no finding by the Board and no proof that its acts or practices affected commerce, substantially burdened or obstructed commerce or led or tended to lead to a labor dispute burdening or obstructing commerce. It asserted that the conclusions of the Board were erroneous in law and in fact.

On this record Petitioner, The J. L. Hudson Company, insisted before the Circuit Court of Appeals that:

1. *The J. L. Hudson Company was not under the National Labor Relations Act.* The J. L. Hudson Company is a retailer of merchandise. Congress did not, in the National Labor Relations Act, regulate or attempt to regulate the acts and practices, in respect to labor, of a retailer of merchandise.

2. *Jurisdiction in the Board must rest on findings and proofs either that the practices charged were "in commerce" or that they affected commerce.* In order that the National Labor Relations Board have jurisdiction in a given situation, it must appear by its findings, supported by substantial evidence: (a) that an unfair labor practice

exists; and (b) that such practice affects commerce, that is, that such practices either are in commerce or that they affect commerce within the definition of "affecting commerce" as set forth in the National Labor Relations Act (Sec. 2 (7)).

3. *Such proof and findings were not waived.* The proof and the findings of the existence of these requisites of jurisdiction (see 2 above) were not waived by The J. L. Hudson Company.

4. *There was no allegation and no finding that the acts complained of were in commerce.* There was no allegation in the complaint and no finding by the National Labor Relations Board that the acts complained of were "in commerce" or that they, in and by themselves, burdened or obstructed commerce.

5. *There was no finding of unfair labor practices or that the acts of The J. L. Hudson Company led or tended to lead to a labor dispute.* There was no finding by the National Labor Relations Board and there could be none on the stipulated facts: (a) that The J. L. Hudson Company was engaged in unfair labor practices as defined in the Act; or (b) that any acts or practices of The J. L. Hudson Company charged in the complaint, led or tended to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

6. *The stipulation could not, and in fact, did not waive the requirement that the Board make findings of the facts necessary to sustain its jurisdiction.* The stipulation plainly reserved the question of jurisdiction. The existence of unfair labor practices and their effect on commerce to

burden or obstruct it being the test of jurisdiction, findings as to these were necessary. There are no such findings. The stipulation did not recite facts which would support such findings. There were no proofs taken. Such findings not having been made and no such facts being proven, there was no jurisdiction in the Board.

The Board contended that the stipulated facts as to the extent of the Company's business moving in interstate commerce, coupled with its advertising which reached beyond Michigan, and its ownership of trademarks, were sufficient to establish jurisdiction in the Board, and that in any event, the stipulation waived any requirement of proof before the Board or findings by it that the acts and practices of the Company were in commerce or affected commerce to burden or obstruct it, or led or tended to lead to a labor dispute, or that they were in fact unfair labor practices.

The Circuit Court of Appeals did not expressly discuss or pass upon the contention of the Petitioner that the Act, by its terms, did not regulate a retailer of merchandise, although it held that the "mere fact that it (the Petitioner) is a retailer of merchandise, conducting business as it does" did not attempt it "from the coverage of the National Labor Relations Act."

The Court held that in the face of the stipulation, the Board was not required to "make findings of fact with respect to unfair labor practices." It decreed that the order of the Board should be enforced.

II. Basis Upon Which This Court Has Jurisdiction to Review the Judgment of the Circuit Court of Appeals

(a) This Honorable Court has jurisdiction to review the judgment of the Circuit Court of Appeals in this case under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938; Title 28 U. S. C. A. 347.

(b) The statute of the United States involved in this proceeding is the Act of Congress known as the National Labor Relations Act (Act of July 5, 1935; 49 Stat. 449, C. 372; 29 U. S. C. A. 151 et seq.), the pertinent provisions of which are set forth in the Brief annexed hereto (pages 14-19).

(c) The judgment of the Circuit Court of Appeals for the Sixth Circuit now sought to be reviewed was entered by the said Court on April 15, 1943, and is final and erroneous.

III. Statement of Questions Presented

The questions presented are:

A. Whether Congress, in the National Labor Relations Act, regulated the retailer of merchandise (the Petitioner being such a retailer) in respect to the acts and practices in such Act described.

B. Whether, if the National Labor Relations Act does regulate the labor practices of a retailer of merchandise, it is necessary, to give the National Labor Relations Board jurisdiction in a given case, that it must appear by the record and the findings of the Board: (a) that an unfair labor practice exists, and (b) that such practice "affects" commerce, that it, was either "in commerce" or burdened or obstructed commerce or the free flow thereof, or had led or tended to lead to a labor dispute burdening or obstructing commerce or the free flow thereof.

(a) Whether the fact that the *business* of the Petitioner involved shipments of goods in interstate commerce and other transactions which made use of interstate commerce is alone sufficient to give the National Labor Relations Board jurisdiction of the complaint filed in this proceeding, there being an absence of proof and findings that the Petitioner was "in commerce," that it was engaged in unfair labor practices and that the challenged acts burdened or obstructed commerce or led or tended to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

C. Whether findings by the Board of the existence of such labor practices and that they affect commerce to

burden or obstruct it, or have led or tend to lead to a labor dispute burdening or obstructing commerce or the free flow thereof, can be waived by the parties in a given case.

D. Whether said findings, if they can be waived, were in fact waived in this case.

IV. Reasons Relied On for the Allowance of the Writ.

(a) The decision of the Circuit Court of Appeals for the Sixth Circuit decided important questions of Federal law which have not been, but should be settled by this Court.

(b) The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

WHEREFORE, your Petitioner prays that this Honorable Court will grant its writ of certiorari directed to said Circuit Court of Appeals for the Sixth Circuit, requiring the complete record of this cause in said Court to be certified to this Court, and that this Court will thereupon proceed to correct the errors herein complained of.

And your Petitioner will ever pray, etc.

THE J. L. HUDSON COMPANY
By HAL H. SMITH,
Counsel for Petitioner.